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No. 01-1128

In the Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD, AND ASHLEY BLACKARD,
Petitioners,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC. AND FAZEL MANEJWALA, M.D.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit correctly decide that there was no judicial bypass procedure in operation at the time of the Petitioner's abortion, and that, in the absence of a bypass procedure, Respondents were not liable under Tennessee's Parental Consent for Abortions by Minors Act for failing to obtain parental consent under the Act?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties. Respondent Memphis Area Medical Center for Women, Inc. is not a corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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STATEMENT OF THE CASE

On March 26, 1998, Ashley Blackard, who was then seventeen years old, sought and obtained an abortion, performed by Respondent Fazel Manejwala, M.D., at Respondent Memphis Area Medical Center for Women (hereinafter "MAMCW"). After viewing a videotape explaining the abortion procedure, discussing the procedure with her counselor, and learning about the various risks and benefits of both pregnancy and abortion, Ashley Blackard consented to the procedure. She did not, however, obtain her parents' consent. (R. 123, Joint Pre-Trial Order). When her parents later learned about the abortion, they filed this suit against Respondents on behalf of themselves and their daughter. Ashley Blackard was added as a plaintiff in her own right when she became eighteen.

In their action, Petitioners alleged that by terminating Ashley's pregnancy without obtaining the consent of her parents, Respondents violated Tennessee's Parental Consent for Abortion by Minors Act (the "Act" or the "Parental Consent Act"), Tennessee Code Annotated §§ 37-10-301 to -307. (R. 1, Complaint). Relying on that alleged violation of the Act, Petitioners charged Respondents with battery, failure to obtain informed consent, and tortious interference with family relations. Id. At the time of the abortion, the Act was enjoined. As a result of the injunction, there existed no judicial bypass alternative to the Act's parental consent requirement when Ashley Blackard received her abortion. Petitioners' claims under the Act were ultimately dismissed because of the absence of a judicial bypass alternative.

Tennessee's Parental Consent Act and the Injunction against its enforcement

The parental consent act requires that a minor seeking an abortion must have either the consent of a parent or a court order obtained through a judicial bypass procedure waiving the requirement. Tenn. Code Ann. §§ 37-10-303, -304. The Act further details the procedures the State is required to follow in its bypass procedure, including procedures for maintaining confidentiality, ensuring expedition by a court hearing a minor's petition, providing adequate assistance through state advocates and, where requested, providing counsel to assist minors. Tenn. Code Ann. § 37-10-304; Tenn. Sup. Ct. R. 24. The Act further provides that the failure to obtain parental consent is prima facie evidence of "failure to obtain informed consent and of interference with family relations in appropriate civil actions." Tenn. Code Ann. § 37-10-307.

Significantly, at the time of Ashley Blackard's abortion, the Parental Consent Act was preliminarily enjoined. It had been enjoined by the Middle District of Tennessee in an action brought by Memphis Planned Parenthood against the Governor, the Attorney General, and the Director of the Administrative Office of the Courts of the State of Tennessee. Memphis Planned Parenthood v. Sundquist, 2 F. Supp. 2d 997 (M.D. Tenn. 1997)(hereinafter the "preliminary injunction" or "injunction").

The district court in Memphis Planned Parenthood enjoined the Act in its entirety after holding that the plaintiff in that action was likely to prevail in showing the Act was unconstitutional. In particular, the district court in Memphis Planned Parenthood concluded that the plaintiff was likely to establish that the bypass procedure itself posed undue and

unconstitutional burdens on minors seeking abortions in Tennessee. Memphis Planned Parenthood, 2 F. Supp. 2d at 1001-06. It further concluded that enforcement of the Act would irreparably harm minors seeking to exercise their right to have an abortion. Id. at 1007. The court issued a preliminary injunction that provided:

> It is Further ordered that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys and all other persons in active concert or participation with them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act. This amended order shall be effective nunc pro tunc August 26, 1997.

(Pet. App. 56a). The injunction remained in effect until at least May 5, 1999, when the Sixth Circuit reversed the district court's order preliminarily enjoining the Act. Memphis Planned Parenthood v. Sundquist, 175 F.3d 456 (6th Cir. 1999). The Sixth Circuit issued its mandate on August 13, 1999, following denial of the plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc. Memphis Planned Parenthood, 184 F.3d 600 (6th Cir. 1999).

On remand to the district court, the Memphis Planned Parenthood parties entered into a joint temporary restraining order ("joint TRO") and a subsequent Agreed Order that continued to bar enforcement of the Act until the State of Tennessee could ensure that the bypass procedure required by the Act was actually operating in compliance with the terms of the Act, the Constitution, and the decision of the Sixth

Circuit reversing the preliminary injunction. (App. 7b and App. 9b). The joint TRO and Agreed Order were supported by evidence that the State was not prepared to implement the bypass in a manner consistent with the Act and the Constitution. That evidence included proof that many courts were not ready to receive minors' petitions for judicial bypasses and that the State did not have in place the advocates required by the Act to assist minors seeking bypasses. See Declarations of Jeanne Carr and Barbara Baldwin (App. 17b and App. 23b). See also Memphis Planned Parenthood, 175 F.3d at 462-63 (emphasizing role of advocates in holding the Act likely constitutional). Under the subsequent Agreed Order, that post-remand injunction remained in effect until, inter alia, counsel for defendants sent notice to all courts with juvenile jurisdiction and all courts charged with hearing the bypass petitions and appeals of denials advising them when the bypass would become effective and of the Act's requirements with regard to bypass proceedings. (App. 9b–15b, ¶¶ 2(a)-(k), ¶ 4). Moreover, under the Agreed Order, the injunction remained in effect until such time as the clerks of the juvenile and circuit courts certified to the Administrative Director of the Courts that they understood the Act's requirements. Id. at ¶¶ 2(k), 3, 4. The injunction was ultimately lifted on February 28, 2000.

Proceedings Below

In response to Petitioners' claims under the Parental Consent Act, Respondents argued that the Act could not be applied to Ashley Blackard's abortion because no judicial bypass alternative to the parental consent requirement existed as a result of the Memphis Planned Parenthood injunction. In support of this contention, Respondents submitted affidavits and declarations, as well as pleadings from the Memphis Planned Parenthood case, all demonstrating that there was no

judicial bypass procedure in effect at the time of the plaintiff Ashley Blackard's abortion procedure. (R. 78-9, Rule 60(b) Motion & Memorandum in Support).

For example, Respondents submitted the affidavit of the Court Clerk of the Juvenile Court of Memphis and Shelby County, C.R. "Bob" Martin, who stated that during the pendency of the preliminary injunction, the juvenile court did not operate the bypass procedure. (App. 2b, ¶ 2). Additionally, Andrew Shookhoff, a former juvenile court judge who was on the bench during the pendency of the preliminary injunction, submitted an affidavit affirming his understanding that during the pendency of the preliminary injunction he did not have the legal authority to hear and decide a petition for a judicial bypass. (App. 5b, ¶ 4).

Respondents also submitted copies of the joint TRO and Agreed Order from the Memphis Planned Parenthood litigation and their underlying declarations. (See App. 7b and App. 9b). As discussed above, those documents further establish that the bypass procedure was not in operation during the pendency of the preliminary injunction. Moreover, Respondents argued that because the juvenile courts of Tennessee are in active concert or participation with the Director of the Administrative Office of the Courts, which was one of the defendants in the Memphis Planned Parenthood case, the juvenile courts too were bound by the preliminary injunction and were therefore barred from operating the Act's judicial bypass procedure while the preliminary injunction was in effect. (R. 100, Defendants' Supplemental Memorandum).

In response to Respondents' evidence and arguments, Petitioners submitted affidavits showing that the Director of the Administrative Office of the Courts does not have

supervisory authority over the juvenile court judges. (Pet. App. 52a and 54a). As the district court emphasized, Petitioners' affidavits established that the Administrative Director does not have supervisory authority over the Tennessee courts, but the affidavits failed to establish that the Administrative Director is not *in privity with* the state courts that implement the bypass, including the juvenile courts. (Pet. App. 28a - 29a).

In its Order Granting Motion for Relief from a Prior Order of November 19, 1999, the district court found:

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating [the Act] for failing to comply with Tennessee's abortion judicial bypass procedure.

(Pet. App. 29a - 30a) (emphasis added). The court thus concluded that in the absence of a judicial bypass procedure, it could not hold Respondents liable under the Act for failing to require parental consent for a minor's abortion. (Pet. App. 30a). Because the claims of Ashley Blackard's parents were based solely on the Act, the district court order had the effect of dismissing them from the suit.

Ashley Blackard proceeded to trial on her common law battery claim. The jury found that Ashley Blackard was

a "mature minor" under Tennessee law,[1] that she was capable of giving consent, and that she did in fact give informed consent to the procedure. The jury granted judgment for the defendants. (R. 135, Verdict). The plaintiffs subsequently filed a motion for new trial, which was denied (Pet. App. 31a).

Petitioners appealed the dismissal of their claims arising under the Act. The Sixth Circuit affirmed both the district court's finding that no bypass procedure was in effect during the pendency of the preliminary injunction, and its determination that the juvenile courts were bound by the preliminary injunction because they are in active concert or participation with the Director of the Administrative Office of the Courts. Blackard v. M.A.M.C.W., 262 F.3d 568, 576-77 (6th Cir. 2001); (Pet. App. 12a-13a). The Sixth Circuit also affirmed the district court's holding that, given the absence of an adequate judicial bypass procedure, Defendants could not be held liable for failing to require parental consent for Ashley Blackard's abortion. Id. at 578. (Pet. App. 16a-17a). Petitioners' request for a rehearing by the panel and a rehearing en banc was denied. (Pet. App. 36a).

SUMMARY OF THE ARGUMENT

State law cannot operate to mandate parental consent for a minor's abortion procedure unless there exists an adequate judicial bypass alternative to the parental consent requirement. That constitutional principle, which underlies

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[1] See Cardwell v. Bechtol, 754 S.W.2d 739 (Tenn. 1987) (holding that there is a rebuttable presumption that a minor between the ages of 14 and 17 is a "mature minor" capable of consenting to medical procedures).

the decisions of the district court and the Sixth Circuit in this case, is well settled by the precedent of this Court. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979). That principle has been uniformly adopted by the federal courts of appeal and the state courts of last resort considering the issue and is not disputed by Petitioners.

Although they try mightily to reframe the issues in this case, the Petitioners raise questions that miss the point of the decisions by the courts below. The Petitioners present no compelling reason for this Court to grant their writ of certiorari. The question on which this case hinges is the factual question of whether a judicial bypass procedure was in place when Ashley Blackard terminated her pregnancy. That is a question of fact and state law that was correctly decided by the courts below. It does not merit review by this Court.

ARGUMENT

I. The Petition for a Writ of Certiorari should be denied because the pivotal question at issue – whether a judicial bypass procedure was in place when Ashley Blackard terminated her pregnancy – is a question of fact and state law.

The pivotal question presented by this case is whether a judicial bypass procedure was in operation at the time that Ashley Blackard terminated her pregnancy. That question arises because of a well-established principle of constitutional law: In the absence of an adequate and operational judicial bypass procedure, the state may not require parental consent before a minor may obtain an abortion. See, e.g., Casey, 505 U.S. at 899 ("[A] State may require a minor seeking an

abortion to obtain the consent of a parent or guardian, *provided* that there is an adequate judicial bypass procedure.") (emphasis added); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-19 (1990); Hodgson v. Minnesota, 497 U.S. 417, 461 (1990); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 440 (1983); Bellotti v. Baird, 443 U.S. 622 (1979).

Thus, in this case, if there existed no adequate judicial bypass procedure when Ashley Blackard terminated her pregnancy, Tennessee's Parental Consent Act could not operate to require parental consent for the abortion. See Blackard, 262 F.3d at 578, 580. More specifically, if there existed no adequate judicial bypass procedure at the relevant time, then Respondents cannot be held liable for refusing to require parental consent. Id.; (Pet. App. 29a – 30a, 35a); see also New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in the impermissible abridgment of constitutional rights); Barrows v. Jackson, 346 U.S. 249 (1953) (same).

Without question, this Court need not review this constitutional principle, which was followed by both the Sixth Circuit and the district court below. It is entirely consistent with the precedent of this Court. See cases cited supra. It is also entirely consistent with the decisions of the other United States courts of appeals and state courts of last resort. See, e.g., Planned Parenthood v. Lawall, 180 F.3d 1022, 1027-28 (holding that state law may not operate to require parental involvement in a minor's abortion decision in the absence of an adequate judicial bypass alternative), amended on other grounds on denial of rehearing, 193 F.3d 1042 (9th Cir. 1999); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1104-05 (5th Cir. 1997) (same); Pro-Choice Mississippi v. Fordice, 716 So. 2d 645, 658 (Miss. 1998) (same). Even

Petitioners concede that a minor is constitutionally entitled to a judicial alternative to a parental consent requirement for abortion. (Pet. for Writ of Cert., p. 16).

The only relevant question that remains, and the question on which this case turns, is whether in fact there existed an adequate and operational judicial bypass procedure when Ashley Blackard terminated her pregnancy. That is a question of fact and Tennessee law. It raises no federal law question of any consequence and, as such, the case does not merit review by this Court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). It is also a question that the Sixth Circuit and the district court below correctly answered.

A. The uncontroverted evidence establishes that there was no judicial bypass procedure in operation when Ashley Blackard terminated her pregnancy.

The district court below clearly and correctly found – and the Sixth Circuit affirmed – that no bypass procedure existed when Ashley Blackard terminated her pregnancy:

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion.

(Pet. App. 29a - 30a) (emphasis added); see also Blackard, 262 F.3d at 576-78.

The uncontroverted proof before the district court amply supports that finding. First, affidavits from court officers responsible for operating the judicial bypass procedure confirm that the bypass procedure in fact was not in effect during the pendency of the preliminary injunction. The clerk of the juvenile court, C.R. "Bob" Martin, swore in an affidavit:

> During the time that [the preliminary] injunction was in force and effect, and in compliance with this . . . injunction, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided by the Tennessee Parental Consent for Abortions by Minors Act.
>
> and
>
> To my knowledge, the Juvenile Court of Memphis, Shelby, County Tennessee has not heard any judicial bypass petitions since 1995.

(App. 2b – 3b, ¶¶ 2, 3). Likewise, a former juvenile court judge, Andrew J. Shookhoff, who was on the bench during the pendency of the preliminary injunction, provided an affidavit stating:

> Among my responsibilities during my tenure as a judge was presiding over petitions filed by minors seeking waiver of the requirement that they obtain a parent's consent for termination

> of pregnancy . . . . While on the bench, I presided over a number of bypass hearings . . . during those periods when the Act was not enjoined.
>
> and
>
> When [Judge Nixon's injunctions] were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petition for judicial waiver of the parental consent requirement.

(App. 5b, ¶¶ 3, 4).

Petitioners make a series of arguments in an attempt to challenge the Martin Affidavit. (Petitioners did not challenge the Shookhoff Affidavit at the district court and cannot do so now for the first time). Petitioners state that they moved to strike the Martin Affidavit and that the district court "discounted the affidavit of C.R. Martin, as not being based on personal knowledge." Petitioners then cite a passage from the district court, incorrectly implying that the district court struck the Martin Affidavit. (Pet. for Writ of Cert., p. 18). Petitioners further argue that the district court did not rely on the Martin Affidavit in its Rule 60(b) order (Pet. App. 22a) because the court did not mention the Martin Affidavit, and that the district court could not have made findings of fact based on affidavits when "facts are in dispute." (Pet. for Writ of Cert., pp. 19-20).

Petitioners' account is misleading and misstates the record. The Martin Affidavit was filed in support of Respondents' joint motion for summary judgment under Rule 56 or for relief from a prior order under Rule 60(b). (R. 78-

80). Petitioners responded to the motion and moved to strike the Martin Affidavit on the basis that the Martin Affidavit was late-filed and because it contained a "hypothetical statement" about what a juvenile court judge "would have done" in light of a minor's petition. (R. 88, p. 5-6, 8-9). (Petitioners' motion to strike was based on Paragraph 4 of the Martin Affidavit). The district court considered both of Petitioners' arguments and found that Petitioners had not established that the Martin Affidavit should be stricken from the record. (R. 94, Order Denying Motion to Strike, p. 4). Although the district court agreed with Petitioners with respect to paragraph 4 of the Martin Affidavit, the court held that Martin could testify as to matters within his personal knowledge. Id. The district court, therefore, left intact paragraphs 2 and 3 of the Martin affidavit, which are quoted above.

Petitioners' statement that the district court did not rely upon or consider the Martin Affidavit in its Rule 60(b) Order is also inaccurate. In its Order, the district court stated that: "It is clear to the Court, *from the record now presented*, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion." (App. 29a - 30a) (emphasis added). The Martin Affidavit was part of the record at that time, as the district court had explicitly denied the Petitioners' earlier motion to strike the Martin Affidavit. The affidavit was, therefore, a part of the record that the district court considered in reaching its factual finding that no judicial bypass existed during the relevant time period.

Petitioners' argument that the district court could not have made findings of fact based on affidavits when "facts are in dispute" is also without merit. After the Martin Affidavit was filed, Petitioners filed the Affidavit of Cornelia Clark and

the statement of Kenneth Turner discussing the duties and the powers of the Administrative Director of the Courts. (See Pet. App. 52a, 54a). Neither affidavit stated that a bypass procedure was in place at the time of Ashley Blackard's abortion procedure, and Petitioners never produced any such evidence. Thus, whether there was a bypass procedure was not a "fact in dispute," and Petitioners' contention is groundless.

Additional evidence in the record further supports the conclusion of the district court and the Sixth Circuit that the bypass procedure was not in place at the time of Ashley Blackard's abortion. Perhaps most tellingly, after the preliminary injunction was reversed in Memphis Planned Parenthood, the State of Tennessee itself in effect admitted that the bypass was not in operation. It agreed to a joint TRO and Agreed Order that continued to bar enforcement of the Parental Consent Act until such time as the defendants, Tennessee Governor, Attorney General, and Director of the Administrative Office of the Courts of Tennessee, could ensure that the judicial bypass procedure was in compliance with the requirements of the Parental Consent Act, the decision of the Sixth Circuit decision reversing the issuance of the preliminary injunction, and the Constitution. The Agreed Order further provided that counsel for the defendants would inform the judges that the Parental Consent Act would not become effective until December 15, 1999. (App. 12b, ¶ 2(f)). Affidavits submitted in support of the joint TRO and Agreed Order provided that communication with various entities charged with implementing the Act, including the juvenile court system and the Tennessee Department of Children Services, indicated that the State of Tennessee was not prepared to implement the judicial bypass procedure under the Act as of August of 1999. Blackard, 262 F.3d at 578; (App. 17b and App. 23b). The joint TRO and Agreed

Order clearly support the conclusion of the district court and the Sixth Circuit that no adequate judicial bypass was in effect when Ashley Blackard obtained her abortion.

Rather than contest the facts establishing that no bypass procedure was in operation, Petitioners argue that whether there was a judicial bypass procedure is not a question of fact, but a question of law. (Pet. for Writ of Cert., p. 16). They contend that because the Act provided for a judicial bypass, a bypass was sufficiently in place, regardless of whether the courts were actually implementing the bypass specified in the Act. As the Sixth Circuit correctly recognized, this argument is simply wrong:

> A [parental consent requirement] does not pass constitutional muster merely because a judicial bypass procedure exists in theory or on paper. An adequate judicial bypass procedure must ensure that the issue of waiver of the parental consent requirement is resolved, including appeals, in a sufficiently anonymous and expeditious fashion to provide an effective opportunity for an abortion to be obtained.

Blackard, 262 F.3d at 576-77; see also Bellotti, 443 U.S. at 642-44. Although on paper the Act sets forth the guidelines for the operation of an adequate bypass procedure, it is uncontested that there was no bypass actually up and running at all times relevant to this case. It is this factual question on which the case turns, a question that is not appropriate for review by this Court.

B. The judicial bypass procedure could not operate during the pendency of the Injunction because the Tennessee Juvenile Courts are in active concert or participation with Tennessee's Administrative Director of the Courts as a factual matter and by virtue of Tennessee law.

It is not surprising that the juvenile courts did not operate the judicial bypass procedure during the pendency of the preliminary injunction, for they were bound by its terms. The injunction barred all defendants in that case[2] and their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing the Parental Consent Act. (Pet. App. 56a). As both the district court and the Sixth Circuit found, the juvenile courts are in active concert or participation with the Director of the Administrative Office of the Courts of Tennessee, one of the named defendants in the case, and as such they were bound by the injunction.

Federal Rule of Civil Procedure 65(d), which governs the scope of a preliminary injunction, provides that an injunction is binding upon "the parties to the action, their officers, agents, servants, employees, . . . and upon those persons in active concert or participation with them . . . ." Fed. R. Civ. P. 65(d). An injunction not only binds the defendant parties, but also those "identified with them in

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[2] The named defendants were Tennessee Governor Donald Sundquist, J. Knox Walkup, Attorney General of the State of Tennessee, and Charles Ferrell, Director of the Administrative Office of the Courts of Tennessee. (See Pet. App. 27a).

interest." See Chase National Bank v. City of Norwalk, 291 U.S. 431 (1934); In re Lennon, 166 U.S. 548 (1897). An injunction also binds those "in privity with or represented by" the defendants. Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945). Whether a person is in active concert or participation with a party depends on the "actual relationship between the person enjoined and the person thought to be bound by the injunction." Blackard, 262 F.3d at 574 (citing Regal Knitwear, 324 U.S. at 14).

The district court and the Sixth Circuit correctly concluded on the basis of the record and Tennessee law that the Administrative Director of the Courts ("Director") and his office are identified in interest with, and part of, the judicial system in Tennessee. Blackard, 262 F.3d at 574-76; (Pet. App. 27a – 29a). The Director has a duty to "assist the Chief Justice [of the Supreme Court of Tennessee] in the administration of the state court system." Tenn. Code. Ann. § 16-3-803(a); see also Tenn. Sup. Ct. R. 11(II)(b) (regarding the supervision of the judicial system). The Director is therefore intimately involved with the judiciary, and the "mutuality of interest" of the Director and the courts revolves around the administration of justice and uniform enforcement of law in the State of Tennessee. The Director is responsible for judicial education. Tenn. Code Ann. § 16-3-502; Tenn. Code Ann. § 38-12-109. In addition, the Director and his office are responsible for notification and communication within the Tennessee court system. Tenn. Sup. Ct. R. 17 and 22. The Director even determines the terms and conditions of appointment for some juvenile court referees. Tenn. Sup. Ct. R. 22. The Director also acts as the secretary to the Judicial Council of Tennessee. Tenn. Code Ann. § 16-3-502(b).

Furthermore, the Director has a statutory duty to "establish criteria, develop procedures, and implement a statewide court system and case management information system." Tenn. Code Ann. § 16-3-502(h). The Director has a statutory duty to "conduct ongoi internal review, analysis, and planning for future needs o the state court system." Tenn. Code Ann. § 16-3-502(k The Director and the Administrative Office of the Courts are responsible for the uniformity of procedure in Tennessee courts through the promulgation of uniform forms used throughout the Tennessee court system. Tenn. Sup. Ct. R. 13; Tenn. Code Ann. § 16-3-810; Tenn. Code Ann. § 40-11-150 (1999 Amendment) (regarding uniform conditional release orders in domestic violence cases).

The Administrative Director of the Courts is also the administrator of the budget of the Tennessee judiciary. With funding from the Administrator of the Courts enjoined, funding for the implementation of the judicial bypass procedures and requirements would be compromised. The Director and his office are directly involved with procedures in state courts to fulfill the needs of civil litigants. See Tenn. Code Ann. § 16-3-803(g) - (j).

Finally, the joint TRO and Agreed Order agreed to by the State after the reversal of the injunction in Memphis Planned Parenthood confirms the close relationship between the juvenile courts and the Director. The Agreed Order required the State Court Administrator to mail forms to the juvenile and circuit courts detailing the courts' responsibilities under the Act. (App. 14b, ¶ 2 (k)). It further provided that the Parental Consent Act would not become effective until the clerks of the respective courts return a signed form to the State Court Administrator acknowledging that they understand the requirements of the Act described by the Administrator.

Id. It is only reasonable to conclude from the joint TRO and Agreed Order that the Administrative Director of the Courts is intimately and actively linked to the courts administering the bypass procedure, and that the bypass procedure demanded by the Act was not in effect when the Act was enjoined.

In the face of this overwhelming support for the conclusion that the juvenile courts and the Administrative Director of the Courts are identified in interest, Petitioners argue that because the Director does not control the courts, the injunction could not bind the courts. (Pet. for Writ of Cert., p. 15) However, as the Sixth Circuit correctly held:

> [the Plaintiffs/Petitioners' definition of the required relationship] is overly narrow and does not comport with the law. It is not necessary that the enjoined party control the third party in order for the third party to be bound by the injunction. The third party is bound by an injunction if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it, *or* subject to its control.

Blackard, 262 F.3d at 576 (emphasis in original) (citing Regal Knitwear, 324 U.S. at 14). It is clear that the Administrative Director of the Courts of Tennessee and the Tennessee Judiciary work in concert to accomplish the goal of administration of justice, including the enforcement of law, in the state of Tennessee, and that it is not necessary that the Director "control" the state courts.

It is worth noting that whether or not the courts were actually bound by the injunction, the district court and the

Sixth Circuit correctly found that there was in fact no judicial bypass in effect. Whether the juvenile court *should* have heeded the Injunction makes no difference when the fact is that the juvenile court *did* heed the Injunction and, as a result, did not implement the constitutionally mandated bypass procedure. (Pet. App. 29a – 30a).

C. Under well-settled authority of this Court, Respondents may not be held liable for failure to require parental consent in the absence of a judicial bypass procedure.

As discussed above, in the absence of a judicial bypass, a government may not constitutionally enforce a scheme requiring parental consent for the abortion decisions of minors. As both the Sixth Circuit and the district court recognized, because there was no judicial bypass available at the time of Ashley Blackard's abortion, state law may not require that she obtain parental consent before terminating her pregnancy. Blackard, 262 F.3d at 578, 580; (Pet. App. 29a – 30a, 35a). Such a result is impermissible when, as here, it would result from a court's application of state civil law in a damages action between private parties, as well as when it results from the enactment of a statute.

This Court has expressly held that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in an impermissible abridgement of constitutional rights. For example, in New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court reversed a damages award in a civil libel action against the New York Times Company, holding that the court's application of state civil law impermissibly abridged liberties

guaranteed by the First and Fourteenth Amendments. Id. at 277-80. The Court held:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citations omitted). See also Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that the First Amendment limits a court's application of state-law tort of intentional infliction of emotional distress).

Similarly, in Barrows v. Jackson, 346 U.S. 249 (1953), the Supreme Court considered the question of whether the state court had properly sustained a demurrer to a complaint alleging breach of a restrictive covenant barring the use or occupation of specified property "by any person . . . not wholly of the white or Caucasian race." Id. at 251. Affirming the lower court's refusal to allow the action to proceed, the Supreme Court recognized that "[i]f a state court awards damages . . . a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur." Id. at 254. Thus, the damages suit could not proceed because it would impermissibly effectuate an unconstitutional regime, in which "[s]olely because of their race, non-Caucasians will be unable to . . .

enjoy property on the same terms as Caucasians." Id. Given that such a regime could neither be effectuated directly by statute, nor in equity by act of judicial enforcement – a result foreclosed by the Supreme Court in Shelley v. Kramer, 334 U.S. 1 (1948) – the Barrows Court held that it likewise could not be effectuated by compelling the defendant to respond in damages. Barrows, 346 U.S. at 258. See also New York Times, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . .").

In the present case, as the Sixth Circuit noted, had it permitted Petitioners' claims to proceed, it would have effectuated an unconstitutional regime which would require abortion providers to obtain parental consent in the absence of a bypass procedure. Blackard, 262 F.3d at 580. Such a regime would contravene the express dictates of established Supreme Court precedent. See, e.g., Casey, 505 U.S. at 899. Indeed, to allow Petitioners to prosecute their damages action against Respondents would sanction Respondents for preserving constitutional liberties by declining to require parental consent at a time when no judicial bypass was in place in Tennessee. This Court's authority prohibits that result.

II. The questions presented by Petitioners are misplaced and need not be addressed by this Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction over the Sixth Circuit's determination that no judicial bypass procedure existed at the time of Ashley Blackard's abortion

and that, therefore, the Parental Consent Act could not be relied upon to impose liability on Respondents for failing to require parental consent.

Petitioners insist that the writ should be granted for three reasons: (1) Respondents violated the Act while it was enjoined at their own risk and cannot now claim immunity from suit; (2) the injunction could have no effect on the Petitioners and Respondents and could not bar the prosecution of the Petitioners' claim because neither Petitioners nor Respondents were parties to the suit that gave rise to the preliminary injunction; (3) the actions of a federal judge in issuing the preliminary injunction cannot render a state statute unconstitutional. These arguments are misplaced.

Like each of Petitioners' arguments, their first contention misses the point of this case. The critical reality here, and the reality that Petitioners cannot contest, is that no bypass procedure was in place during the pendency of the preliminary injunction. As a result, while the preliminary injunction was in effect, state law could not operate to require parental consent for a minor's abortion. By positing that Respondents cannot claim immunity from suit for their actions during the pendency of the preliminary injunction, Petitioners are effectively arguing that even though Ashley Blackard could not seek a judicial waiver of the Act's parental consent requirement, the Act should operate to mandate that Respondents obtain parental consent for her abortion. As the Sixth Circuit explained:

> Such a result, however, would unduly burden a minor's right to an abortion. If there is no judicial bypass procedure in place, neither the minor nor her physician can legally be required to seek parental consent. As

> [Respondents] have noted, to allow this litigation to go forward would be tantamount to fostering an unconstitutional regime.

Blackard, 262 F.3d at 580.

Petitioners' second argument misses the point for the same reason. Regardless of whether they or Respondents were parties in the case that gave rise to the preliminary injunction, there was no bypass in place during the pendency of that injunction. Accordingly, Respondents cannot be held liable for failing to obtain parental consent while the injunction was in effect.

Petitioners' final argument is equally misguided. It is well within the purview of a federal court to issue an injunction enjoining enforcement of a state statute. See, e.g., Doud v. Hodge, 350 U.S. 485, 487 (1956). In this instance, by virtue of such a preliminary injunction, there existed no judicial bypass procedure while the injunction was in effect. In the absence of an adequate judicial bypass procedure, neither state nor federal actors could constitutionally require parental consent for a minor seeking an abortion. That fundamental and well-settled principle resolves this case despite Petitioners' strenuous efforts to recast the questions presented.

Neither the Sixth Circuit's ruling nor the district court's decision below raises the questions presented by Petitioners. Those rulings are based on the finding that no judicial bypass procedure was in operation during the pendency of the preliminary injunction procedure. Petitioners never disputed this fact. The rulings further apply this Court's well-settled authority establishing that in the absence of the required bypass procedure, the government can not

require parental consent for a minor to receive an abortion. The rulings do not involve any unsettled federal law question and do not conflict with decisions in other Circuits.

CONCLUSION

For the foregoing reasons, Respondent Memphis Area Medical Center for Women, Inc. respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, and grant this Respondent such other relief to which it is entitled.

Respectfully submitted,

James L. Kirby, Esquire
Counsel of Record
Harris, Shelton, Dunlap,
Cobb & Ryder, P.L.L.C.
2700 One Commerce Square
Memphis, Tennessee 38103-2555
(901) 525-1455

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 98-2996 MI A

[Filed August 31, 1999]

MICHAEL BLACKARD,	)
SHARON BLACKARD, AND	)
ASHLEY BLACKARD,	)
Plaintiffs,	)
	)
v.	)
	)
MEMPHIS AREA MEDICAL	)
CENTER FOR WOMEN, INC.,	)
UT MEDICAL GROUP, INC.,	)
FAZEL MANEJWALA, M.D.	)
Defendants.	)
	)

AFFIDAVIT OF C.R. "BOB" MARTIN

STATE OF TENNESSEE
COUNTY OF SHELBY

After being duly sworn, the affiant makes oath as follows:

Affidavit of C.R. "Bob" Martin - 8/31/99

1. I am the Court Clerk of the Juvenile Court of Memphis and Shelby County, Tennessee, and I have held this position since 1988. I have knowledge of the facts hereafter set forth in this affidavit.

2. After the Tennessee legislature enacted the Parental Consent for Abortions by Minors Act, the case of *Memphis Planned Parenthood v. Donald Sundquist, Governor of the State of Tennessee, in his official capacity, J. Knox Walkup, Attorney General of the State of Tennessee, in his official capacity, and Charles Ferrell, Administrative Director of the Courts of Tennessee, in his official capacity*, was filed in the United States District Court for the Middle District of Tennessee. A Second Supplemental Complaint was filed in that case on September 5, 1997, a copy of which is attached hereto. In that case, the United States District Court on September 15, 1997 issued an Order which restrained and enjoined all defendants in that case and their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing Tenn. Code Ann. Sections 37-10-301 through 37-10-307 (the Parental Consent for Abortions by Minors Act). A copy of the Order of injunction was provided to me and is attached hereto. This Order remained in force and effect until it was overturned by the United States Court of Appeals for the Sixth Circuit on May 3, 1999. During the time that this Order of injunction was in force and effect, and in compliance with this Order of injunction, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided by the Tennessee Parental Consent for Abortions by Minors Act.

3. To my knowledge, the Juvenile Court of Memphis and Shelby County Tennessee has not heard any judicial bypass petitions since 1995.

4. As the Clerk of the Juvenile Court of Memphis, Shelby County, Tennessee, if a citizen had attempted to file a petition for a judicial bypass of the Parental Consent for Abortions by Minors Act under Tennessee Supreme Court Rule 24 in March 1998 or at any time when the injunction was in effect, I would have accepted the petition for filing. However, as an officer of the court I would have obeyed the above referenced injunctive Order of the United States District Court for the Middle District of Tennessee and therefore would not have acted upon the Rule 24 judicial bypass petition, nor would the Juvenile Court have acted on the petition.

/s/_____
C.R. "Bob" Martin
Court Clerk of the
Juvenile Court of Memphis
and Shelby County, Tennessee

SWORN TO AND SUBSCRIBED before the undersigned Notary Public this 27th day of August, 1999.

/s/_____
Notary Public

My Commission Expires: May 23, 2000

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 98-2996 MI A

[Filed November 8, 1999]

MICHAEL BLACKARD, and	)
SHARON BLACKARD, both,	)
individually and as parents,	)
Legal guardians and next friends,	)
For ASHLEY BLACKARD,	)
a minor,	)
Plaintiffs,	)
	)
v.	)
	)
MEMPHIS AREA MEDICAL	)
CENTER FOR WOMEN, INC.,	)
JOHN DOE and JANE DOE,	)
Defendants.	)
	)

DECLARATION OF ANDREW J. SHOOKHOFF

Andrew J. Shookhoff declares under penalty of perjury that the following is true and correct:

Declaration of Andrew J. Shookhoff

1. I am on the faculty of Vanderbilt University, where I hold appointments in public policy and law.

2. From September 1, 1990 to August 31, 1998, I served as the Juvenile Court Judge for Davidson County.

3. Among my responsibilities during my tenure as a judge was presiding over petitions filed by minors seeking waiver of the requirements that they obtain a parent's consent for termination of pregnancy. The requirement that the minor obtain parental consent, and that she be able to petition the juvenile court for a waiver of the consent requirement, was established by the Parental Consent for Abortions by Minors Act, Tenn. Code Ann §§37-10-301 to -307. In particular, the Act conferred upon minors who elected not to seek consent of a parent the right to petition the juvenile court for relief. While on the bench, I presided over a number of bypass hearings pursuant to this law during those periods when the Act was not enjoined.

4. During my time on the bench, I complied with the requirements of the law regarding the Parental Consent for Abortions by Minors Act. On more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement.

/s/_____
Andrew J. Shookhoff

/s/_____
Notary Public

My Commission Expires
November 27, 1999

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Filed September 3, 1999]

MEMPHIS PLANNED PARENTHOOD ASSOCIATION, Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

BEFORE
Judge Nixon

AGREED TEMPORARY RESTRAINING ORDER

Upon the remand of this case from the United States Court of Appeals for the Sixth Circuit reversing this Court's issuance of a preliminary injunction, the plaintiff has filed a Motion for Limited Preliminary Injunction for the "limited time necessary for the State to ensure that the bypass procedure demanded by the Act, the Constitution, and the

Sixth Circuit opinion is in place." By agreement of the parties as evidenced by the signature of their counsel below, the defendants are RESTRAINED from enforcing Tennessee's Parental Consent Abortion Act, Tenn. Code Ann. §37-10-301, *et seq.* and Tennessee Supreme Court Rule 24. Fifteen days from the date of entry of this order, the parties shall either enter an agreed final order or the plaintiff shall request an immediate hearing as to whether this Court should grant the plaintiff's Motion for Injunctive Relief. This Agreed Temporary Restraining Order shall remain in effect until such time as the parties submit an agreed final order or this Court rules on the plaintiff's Motion for Injunctive Relief, but in any event the time of this Agreed Temporary Restraining Order shall not exceed thirty days from its entry.

It is so ordered.

/s/_____
John T. Nixon
Senior District Judge

Approved for Entry:

/s/_____
Louise Melling
Reproductive Freedom Project
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
Attorney for Plaintiff

/s/_____
Michael W. Catalano
Associate Solicitor General
Office of the Attorney General
425 5th Ave. North
Nashville, Tennessee 37243
Attorney for Defendants

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Filed October 13, 1999]

MEMPHIS PLANNED PARENTHOOD ASSOCIATION, Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

BEFORE
Judge Nixon

AGREED ORDER

On May 5, 1999, the United States Court of Appeals for the Sixth Circuit reversed the order of this Court granting the plaintiffs Motion for Preliminary Iniunction and then stated that "the cause is remanded to the district court for further proceedings consistent with this opinion." The plaintiff then timely filed a Petition for Rehearing and Suggestion for

Rehearing En Banc which the Sixth Circuit denied on August 13, 1999.

Since the remand of this case, the parties have agreed to enter an order, as evidenced by the signature of their counsel below; therefore, the following is ORDERED:

1. In light of the Sixth Circuit holding, the defendants may implement Tenn. Code Ann. §37-10-301, *et seq.* and Tennessee Supreme Court Rule 24 (collectively known as the Parental Consent Law) subject to the following provision:

The defendants are permanently enjoined from enforcing that provision of Tennessee Supreme Court Rule 24(4), limiting the venue for a minor pursuing a bypass petition to the county in which she resides or in which the abortion is sought. The Parental Consent Law's provision permitting the minor to petition any juvenile court in the state, Tenn. Code Ann. §37-10-303(b), shall govern.

2. The Parental Consent Law shall become effective when and not until the defendants accomplish the following in accordance with Parental Consent Law:

a. The Commissioner of the Department of Children's Services shall, in accordance with Tenn. Code Ann. §37-10-304(c)(2), designate from existing staff at least one court advocate in each judicial district of the State of Tennessee who shall provide minors with information regarding requirements and procedures established by the Parental Consent Law, assist in coordinating the activities of court-appointed counsel, attend legal proceedings with the

minor or the minor's next friend, and make available written materials concerning the provisions and applications of the Parental Consent Law.

b. The Commissioner of the Department of Children's Services shall provide all court advocates training in the juvenile court procedures, the procedures established by Tenn. Code Ann. §37-10-301 *et seq,* and in counseling minors as required by Tenn. Code Ann. §37-10-340(c)(2). The training shall also be made available to persons who staff the toll-free number and the juvenile court personnel who wish to attend.

c. The Commissioner of the Department of Children's Services shall provide and staff a toll-free telephone number for minors to use in order to obtain the telephone number and address of a court advocate most convenient to the minor in accordance with Tenn. Code Ann. §37-10-304(c)(2).

d. The Commissioner of the Department of Children's Services shall provide and distribute a written brochure or information sheet designed to assist minors pursuing a bypass that summarizes the provisions and applications of Tenn. Code Ann. §37-10-301 *et seq,* and Tennessee Supreme Court Rule 24, and includes the toll-free number as well as a list of the names, telephone numbers and addresses of the court advocates for each judicial district.

e. The Commissioner of the Department of Children's Services shall distribute such brochures or information sheets to the following: (1) juvenile court judges of this state and any judges with juvenile court jurisdiction in

this state; (2) juvenile court clerks of this state and any clerks with responsibilities for the juvenile court in this state; (3) circuit court judges of this state; (4) circuit court clerks of this state; (5) district attorneys of this state; (6) all ambulatory surgical treatment centers in state licensed specifically to perform abortions; (7) court advocates; and (8) agencies and persons that administer and staff the toll-free number.

f. Counsel for the defendants shall provide to the judges, clerks, officials and other interested entities identified in paragraph 2(e), Notice that the Parental Consent Law will become effective on December 15, 1999. Such Notice shall expressly and boldly advise recipients that the Parental Consent Law directs that minors have the opportunity to file for a bypass and directs that the procedure be expeditious and confidential. The Notice shall further state, in bold form, that the Parental Consent Law requires, among other elements, that all records be sealed; that the applicant shall be identified or referred to in all pleadings by initials except for one copy of the petition, which is to contain the applicant's true name and is to be filed under seal; that documents pertaining to the proceedings shall NOT be entered on court minutes but shall be maintained in a closed file that shall be conspicuously marked SEALED MATERIALS -- CONFIDENTIAL; that the hearing shall be closed to all but individuals specified in the Rule; and that the times for the court to act on filings are short and specified in the Rule. This Notice, like all others, shall also include the statements referenced in paragraphs 2(h) and 2(i).

g. Counsel for the defendants shall also provide the following to the judges, clerks, officials and other interested parties identified in paragraph 2(e): (1) A copy of

Tenn. Code Ann. §37-10-301 *et seq.*; (2) A copy of the Tennessee Supreme Court Rule 24; (3) A copy of the decision of the United States Court of Appeals for the Sixth Circuit dated May 5, 1999; (4) A Form Petition for Judicial Authorization of an Abortion Without Parental Consent based on Tennessee Supreme Court Rule 24; and (5) a copy of this Order.

h. All training, materials, notices, petitions, and other materials describing the Parental Consent Law and its provisions, including but not limited to those materials referenced above, shall expressly state that the Rule's provision limiting the minor's choice of venue to her home county or the county in which the abortion shall be performed, shall not be.enforced and that the minor may file a petition in any county in the state.

i. Similarly, any and all training, materials, notices, petitions, and other materials describing the Parental Consent Law and its provisions, including but not limited to the materials referenced above, shall state that the provision of the sample petition, contained in Rule 24, specifying that the minor is "of sound mind and has sufficient intellectual capacity to consent to an abortion," does not set forth a requirement of the petition. All materials shall further state that, the provision of the petition notwithstanding, the minor shall not be foreclosed from pursuing a bypass if she does not have that capacity.

j. The defendants shall also notify the juvenile court judges, judges with juvenile court jurisdiction, and circuit court judges in each judicial district that minors pursuing a bypass must be advised that they have a right to counsel and that minors who request counsel for their bypass

proceeding are entitled as a matter of law to counsel paid by the state and appointed by the court.

k. The State Court Administrator shall mail to the clerks of the courts with juvenile court jurisdiction a form pertaining to control and maintenance of their dockets as to petitions filed under Tenn. Code Ann. §37-10-304. Specifically, that form shall inform the clerks of the following: that a minor may file a judicial bypass petition in their court; that the minor shall be identified by initials only on all documents except one copy of the petition, which shall include her name; that all documents related to the judicial bypass shall be sealed; that no fee may be demanded of the minor; that the judicial bypass proceedings shall be maintained on a separate sealed docket; that the iudicial bypass proceedings may be identified on a docket open to public inspection only by a case number; that documents pertaining to the proceeding shall not be entered on the court minutes, but shall be maintained in a closed sealed file; that the hearing shall not be open; and that the proceedings must be conducted within set times prescribed in the Rule. This form shall contain a place for the signature of each clerk acknowledging receipt of the form to the effect that they have read and understand the foregoing requirements and shall require that the clerks return the signed form to the State Court Administrator before the Parental Consent Law can become effective. The State Court Administrator shall also mail to the circuit court clerks a form pertaining to control and maintenance of their dockets as to appeals filed under Tenn. Code Ann. §37-10-304. Specifically, that form shall inform the clerks of the following: that the minor may appeal a denial of a judicial bypass petition to their court; that the records must be sealed; that the hearing shall not be open; and

that the proceeding must be conducted within set times prescribed in the rule. This form shall contain a place for the signature of each clerk acknowledging receipt of the form to the effect that they have read and understand the foregoing requirements and shall require that the clerks return the signed form to the State Court Administrator before the Parental Consent Law can become effective. Following mailing the notice, the State Court Administrator shall file with the court the signed certification form from the clerks of each of the juvenile and circuit court's acknowledging receipt and understanding of the notice.

3. The implementation of the Parental Consent Act shall be enjoined, in any and all respects, until such time as the defendants certify to this Court that the requirements of paragraph two have been satisfied. The defendants shall accompany the certification with a copy of the list of advocates, the written brochure or information sheet referenced in paragraph 2(d), a copy of the notices referenced in paragraphs 2(f), 2(j) anti 2(k), the form petition, and the signed certifications referenced in paragraph 2(k).

4. The iniunction shall remain in effect until December 15, 1999, and no later, provided the requisite certification is filed in this Court no later than December 8,1999, and provided the Court does not extend or restore the injunction as provided in paragraph 5.

5. Should the certification not be filed, or in the event this Court concludes, on its own initiative or on review of any objections lodged by the plaintiff, that the certifications do not reflect adequate compliance with the requirements of paragraph two, it may extend or otherwise restore an

injunction against enforcement of the Parental Consent law, pending the defendants' satisfaction of any outstanding requirements.

/s/_____
John T. Nixon
Senior District Judge

Approved for Entry:

/s/_____
Louise Melling
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
Attorney for Plaintiff

/s/_____
Michael W. Catalano
425 5th Ave. North
Nashville, Tennessee 37243
Attorney for Defendants

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Dated August 24, 1999]

MEMPHIS PLANNED PARENTHOOD, INC. Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

DECLARATION OF JEANNE GRAY CARR

Jeanne Gray Carr states subject to the penalties of perjury:

1. I am the CEO/President of Memphis Regional Planned Parenthood, the plaintiff in this case. In order to prepare for implementation of the Tennessee Parental Consent for Abortions by Minors Act (the Act), I contacted or had a Planned Parenthood employee contact various persons who will be responsible for implementing the Act, both in the juvenile courts and in the Tennessee Department of Children's

Service (the Department) to see if they will be ready to receive minors seeking a waiver of the parental consent requirement. Based on these contacts, it is my opinion that the State of Tennessee is not prepared to implement the Act and that its implementation at this time, without further preparation on the part of state officials, will irreparably endanger the welfare of minors seeking abortions in Tennessee. I submit this declaration in support of limited injunctive relief, preventing enforcement of the Act, until such time as the advocates and other procedures necessary for the court bypass are in place.

2. The Act requires that minors have either parental consent or a court order if they are to obtain an abortion. Under the Act, minors who pursue a court order must file their petition in the juvenile court. To assist the minor with the process, the Act requires that the Department of Children's Services assign a court advocate from each judicial district to provide minors with information regarding the Act, to assist in coordination of the activities of court-appointed counsel, to attend legal proceedings with the minor or the next friend, and to make available to the minor written material concerning the provisions of the Act and the bypass procedure. The Act also requires that the advocate be trained in the provisions of the Act and in juvenile court procedures. In order to ascertain whether these critical processes are in place, I made the calls described here.

3. On Thursday, August 19, 1999, our manager of Clinic Education and Services, Laura Keefe, called the toll-free number that the Act requires the State to establish to assist minors seeking a judicial bypass and to provide the minors with the name, telephone number and address of the

court advocate for their judicial district. Ms. Keefe asked if a current list of advocates was available. She was told by the person answering the phone that no list was available as yet.

4. Also on Thursday, August 19, 1999, Laura Keefe and I had a meeting with Faye Howard, manager of the juvenile court for Shelby County (Memphis), and Jeanne Brown, a representative of the Department in Shelby County. Although Ms. Howard viewed the Shelby County juvenile court as ready to implement the Act, Ms. Brown stated that the Department has not updated its policies and procedures for court advocates to follow in assisting minors through the judicial bypass since 1995. (This is significant as new court rules were issued by the Tennessee Supreme Court in 1997.) Furthermore, as far as she knew, no advocates had been appointed as required by the Act, either in Shelby County or elsewhere; no training had been provided to advocates as required by the statute; and the statutorily required written information was not ready. When asked, Ms. Brown responded that she felt she and the Department needed more time to prepare to assist minors who seek the judicial bypass. This meeting is the latest in a series of contacts with the Department and the Shelby County Juvenile Court I began making in May (when the Sixth Circuit first ruled in this case) in an effort to ensure that a viable bypass option was available, at least in Memphis.

5. On Friday, August 20, 1999, I called the juvenile court in Fayette County, a county from which our clinic draws patients and which is contiguous to Memphis. I spoke to Jan Doyle, a clerk in the juvenile court who works for juvenile Judge Weber McCraw. Ms Doyle was unaware of the parental consent law or of any decision from the Sixth

Circuit that might put the law into effect. She said that the Fayette County juvenile court was not ready to implement the law and would appreciate more time to get ready. She asked me to fax her a copy ofthe law.

6. Also on Friday, August 20, 1999, I called the juvenile court in Tipton County, a county contiguous to Memphis, from which our clinic draws patients. I spoke to Darryl Rozell, a youth services and juvenile court officer who is responsible for scheduling cases in juvenile court. He said he knew that the parental consent law existed but he was unaware of any recent changes in the court rules or of the decision of the Sixth Circuit that will put the law back into effect. When I asked him if the court was ready to implement the law, he said "obviously not" and would appreciate time to get ready. He asked me to fax a copy of the law to him.

7. Also on Friday, August 20, 1999, I called the juvenile court in Dyer County in West Tennessee because that county contains the city of Dyersberg, another population center from which we draw patients. I spoke to Sandy Sanders, the manager of the juvenile court. She was unaware of the Act or of any decision of the Sixth Circuit that will put the Act into effect and stated that she was not ready to implement it. She asked me to fax a copy of the law to her.

8. Also on Friday, August 20, 1999, I called the juvenile court in Madison County, which contains the City of Jackson, another population center from which we draw patients. I left a message for the juvenile court and stated the purpose of my call was to find out about the court's plan to implement the parental consent law. My phone call was not returned.

9. Based on the forgoing conversations, I believe that many juvenile courts in the part of the state from which I draw clients, with the exception of Memphis, are ill-prepared to implement the judicial bypass system, making the existence of trained court advocates to assist minors particularly important. This lack of court readiness, together with the failure of the State to appoint or train court advocates, will harm patients. The task of pursuing a bypass is formidable, Minors struggling to pursue a bypass cannot be in the position of calling a court that is unaware of the law and unable to assist them. Neither can they shoulder the burden of fighting alone for access. In addition to help in navigating and explaining what may be a daunting process for young women, the advocate will play an important role in helping the minor access counsel and set up appointments with counsel and the court. This is an especially critical function for minors who, in seeking to protect their confidentiality, may be unable to readily make and receive phone calls. If the minor needs to meet the Act's 24-hour appeal deadline, the assistance of the advocate may be even more critical in ensuring she learns orthe court's negative decision and can communicate with her lawyer in a timely fashion.

10. For all these reasons, absent greater readiness on the part of the courts and the advocates, minors may be subject to delays and confusion in attempting to access the judicial bypass and some will be unable to obtain a bypass, and thus an abortion, at all.

I declare subject to the penalty of perjury that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/_____
Jeanne Gray Carr

Dated: August 24, 1999

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Dated August 24, 1999]

MEMPHIS PLANNED PARENTHOOD, INC. Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

DECLARATION OF BARBARA BALDWIN

Barbara Baldwin declares subject to the penalties of perjury:

1. I am Executive Director of Planned Parenthood of Middle Tennessee, which operates a facility that provides abortion services in Nashville. Because minors seeking abortions at our facility will be subject to the Parental Consent for Abortions by Minors Act (the Act), I made a series of calls to determine what procedures are in place to assist a minor through the judicial bypass. It is my impression, based

on these contacts with state officials and court personnel, that the State of Tennessee is not prepared to implement the judicial bypass. I, therefore, fear that the Act will cause irreparable injury to minors seeking abortions in Tennessee. I am therefore submitting this declaration in support of the plaintiff's application for limited injunctive relief until such time as Tennessee has in place a viable bypass option.

2. The Act requires that minors have either parental consent or a court order if they are to obtain an abortion. Under the Act, minors who pursue a court order must file their petition in the juvenile court. To assist the minor with the process, the Act requires that the Department of Children's Services (the Department), assign a court advocate from each judicial district to provide minors with information regarding the Act, to assist in coordination of the activities of court-appointed counsel, to attend legal proceedings with the minor or the next friend and to make available to minors written material concerning the provisions of the Act and the bypass procedure. The Act also requires that the advocate be trained in the provisions of the Act and in juvenile court procedures. If I am to send my patients to court, which I must now do, I am concerned that these processes be in place. Since the Sixth Circuit decision, I have placed periodic calls to see if the state has been preparing for implementation. Since the court denied the petition for rehearing and implementation became imminent, my concern for my patients and thus my calls have intensified.

3. I first attempted to determine if the Department had in place the system of trained court advocates that the statute requires. On Thursday, August 19, 1999, I spoke with Marilyn Hayes, Assistant Commissioner of the Department.

Ms. Hayes told me there is no updated list of advocates available and the existing list was last revised in 1997, since which time personnel have changed. She also stated that no new advocates had been appointed, that there were no plans for training advocates, and that the last training occurred in 1997. She also stated that the written materials that the Act requires that the court advocates make available to minors had not been updated since 1997.

4. On Friday, August 20, 1999, I called the toll-free number that the Act requires the State to maintain for minors seeking help with the judicial bypass and through which they can obtain the telephone number and address of a court advocate. The person who answered the phone told me that she had no updated list of advocates; the only list she had is dated 1997. On Tuesday, August 24, 1999, I called Karen Spencer, the person who oversees operation of the toll-free number at Crittenton Services (the agency that runs the toll-free number for the state). She confirmed that she had no list of advocates more recent than 1997, She also informed me that she believed that minors would have to go to their counties of residence to obtain a bypass. I informed her that according to the decision of the Sixth Circuit minors may pursue a bypass in any county in the State. This conversation leads me to conclude that persons answering the toll-free number need training on the requirements of the Act.

5. On Thursday, August 19, 1999, I called the Rutherford County juvenile court. Rutherford County is contiguous to Nashville and an area from which we draw our patients. I spoke to Kenna Campbell, the person who answered the phone when I asked for the juvenile court. She had no information about the Act or the judicial bypass. She

stated that she had no idea how to help me and that the court had no process for handling minors seeking the judicial bypass in Rutherford County.

6. On Friday, August 20, 1999, I called the juvenile court in Sumner County, also a populous county contiguous to Nashville from which we draw our clients. I spoke to a woman named Cheryl, who identified herself as Judge Barry's secretary. She stated she had no knowledge of any process for handling minors who might come to the court for the judicial bypass. She consulted one of the judges who instructed her to say that no one would be able to help me until next week. On Monday, August 23, 1999, Cheryl called me back and said she had checked with the judge and he said he was unaware that the statute was or would soon be in effect or of the 1997 court rules, and once he got more information he would put a process in place to handle bypass petitions.

7. On Friday, August 20, 1999, I called the Williamson County courthouse. Williamson County is another county contiguous to Nashville. I asked to speak to the juvenile court and I was put through to a person named Samantha Curtis. Ms. Curtis knew nothing about the parental consent law or the judicial bypass and said she would check with the judges and would get back to me next week. To date I have not received such a call.

8. In contrast, on Monday, August 23, 1999, I spoke to Larry Gibney, the court administrator in Knox County, who stated he knew about the Act, and was prepared to assist minors who request judicial bypass. He also stated that a court advocate was in place for Knox County.

9. On Friday, August 20, 1999, I called the juvenile court in Hamilton County (Chattanooga). I told the person who answered the phone that my purpose was to find out about implementation of the judicial bypass. I was told that Mr. Albright, the court administrator, would call me back. To date, I have not received a return call.

10. It is my understanding, based on conversations with Nashville attorneys, that the juvenile court in Davidson County (Nashville) is prepared to implement the judicial bypass. I do not, however, believe an advocate has been appointed in Davidson County. On Tuesday, August 24, 1999, I spoke to Brenda West, a supervisor at the Department in Nashville who told me that the person listed on the 1997 list of advocates no longer works for the Department. She was unable to supply the name of a new advocate.

11. Based on the above conversations, it is my impression that the State of Tennessee is at present ill-prepared to put the judicial bypass into effect. Juvenile courts in populous counties have no idea that the law was scheduled to take or had taken effect and have in place no procedures to assist minors who seek a judicial bypass. This makes the role of the statutorily-required court advocates all the more critical. The advocates are particularly critical in helping the minor contact her attorney or the court, as young pregnant women seeking to protect their confidentiality have difficulty making or receiving phone calls. Help with contacting her lawyer and the court will be particularly important if the minor needs to meet the twenty-four hour appeal deadline, which starts to run the moment the juvenile court denies her petition. The advocate can also assist the minor to navigate a complex judicial bypass system.

12. Despite minors' dire need and the mandate of the Act, the State has not published an updated list of advocates, appointed new advocates, or provided them with training. Nor have the courts been apprised of the Act's having taken effect. For all these reasons I believe that minors will be irreparably injured by the Act.

I declare under penalty of perjury that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/_____
Barbara Baldwin

Dated: August 24, 1999